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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-368

PETER BENSINGER, DIRECTOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS, and JOHN J. TWOMEY, WARDEN, JOLIET-STATEVILLE PENITENTIARY,

Petitioners,

vs.

UNITED STATES OF AMERICA, EX REL. RONALD DOSS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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RESPONSE NOT FILED

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Peter Bensinger and John Twomey, Respondents-Appellees in the Court below, pray that a writ of certiorari issue to review the judgment handed down by the United States Court of Appeals for the Seventh Circuit in this case on June 15, 1972.

OPINION BELOW.

The opinion of the United States Court of Appeals, Seventh Circuit, is reported at .....F. 2d..... (7th Cir. 1972) (No. 71-1582), and is attached hereto as Appendix

A. That Court's denial of rehearing and rehearing *en banc* is attached hereto as Appendix B.

JURISDICTION.

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on June 15, 1972. The State's petition for rehearing or rehearing *en banc* was denied on July 21, 1972.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Does confrontation with evidence constitute "interrogation" under *Miranda,* and did police violate respondent's "*Miranda* rights" when they simply confronted him with his co-defendant who had already confessed, thereby inspiring the respondent to surrender the murder weapon?

2. Did police violate respondent's "*Miranda* rights" when, after giving him the required warnings, they requested more than once that he abandon his stone-like silence?

3. If the arresting officers' did violate respondent's rights during their own or his co-defendant's confrontations with him, did the consequent introduction into evidence of the murder weapon with its attendant testimony amount only to harmless error?

CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment to the Constitution of the United States:

> ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . ."

Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE.

On April 3, 1967, Lenford Marshall was murdered by a gunman during the armed robbery of his grocery store in South Beloit, Illinois. Respondent and his co-defendant, Ophem Falconer, were arrested for the crime the following morning after a raid on their Rockford motel room by sheriff's police. A jury in the Circuit Court of the 17th Judicial Circuit, Winnebago County, convicted respondent and his co-defendant of the murder on July 20, 1967, and recommended the death penalty for each man. At trial, Mrs. Jean Marshall, the victim's widow, and Mrs. Gloria Donath, a clerk, both testified that they were in the grocery store when the crime took place and that Falconer had wielded the gun which killed Mr. Marshall while respondent was his accomplice in the armed robbery (R. 613-650). (References are to the State trial record which was made part of the Record on Appeal below.) The murder weapon (a pistol), several hundred dollars in cash and a revolver, owned by Mr. Marshall and taken during the robbery, were all found in or around the defendants' Rockford motel room; the guns were later introduced into evidence (R. 622, 781-782, 796, 802, 817). Falconer himself admitted the shooting in two statements made to police (R. 86, 90), one of which was suppressed by the trial court (R. 122) and neither of which was ever introduced into evidence at trial (see: R. 589, 817 for list of exhibits; R. 778-816 for testimony of police witnesses).

The chain of events leading to the custodial confrontation which produced the murder gun and which is chal-

lenged in the present action began with the arrest of respondent and his co-defendant by sheriff's police on April 4, 1967. Having been advised of his Constitutional rights by Officers Lampher and Bailey who had taken him into custody, respondent was asked to waive these rights so that interrogation could proceed; however, he remained silent, refusing even to divulge his name, address and age (R. 200, 235, 236). Officer Bailey then asked respondent several times to identify himself and to indicate whether he wished to waive his *Miranda* rights ("If I asked him once I probably asked him a dozen times") (R. 235-36). However, no questions were asked about the crime itself. (R. 236). After it became apparent that Doss intended to maintain complete silence, the two officers ceased asking even basic questions about his identity and booked him in jail upstairs (R. 200, 228). During the booking procedure in the County Jail, there was no interrogation of the suspect (R. 229).

Approximately one hour later, respondent was visited by Sergeant Ebens and Officer Renfro who again advised him of his rights and tried to ascertain his identity as well as his potential for cooperation (R. 785). When Doss indicated that he did not wish to make any statement, the officers ceased their questioning and brought the silent prisoner to Captain Iasparro's office where they joined co-defendant Ophem Falconer and some other sheriff's police (R. 786). Falconer had actually initiated this confrontation when he expressed a desire to get the murder weapon from Doss (R. 156); evidently he also initiated conversation with Doss when the two were brought face to face (R. 128-130, 136-140, 146-148, 158-160, 170). Being aware of Falconer's desire, Evens and Renfro had moved respondent on a "mutual understanding" of what to "do next," and they had not been ordered to bring respondent to the Captain's office (R. 155-156). As the

two suspects confronted each other, no questions were directed to them by the officers, but Falconer asked that Doss show police where the murder weapon was hidden —a request with which the respondent willingly complied (R. 128-130, 136-140, 146-148, 158-160, 170, 787, 801 and 809). All of the state's witnesses agreed on this sequence of events and the voluntariness of respondent's action in locating the gun. Following the confrontation with Falconer, respondent was taken immediately by several officers to the motel where, without any further questioning, he led them to the buried revolver (R. 163-165, 184, 801).

Before trial in the Winnebago County Circuit Court, respondent's attorney moved to suppress the murder weapon, claiming that it was discovered through a violation of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). However, the trial judge denied this particular motion and the murder gun was admitted into evidence along with testimony about respondent's conduct in leading police officers to the weapon and ballistic proof that the gun was used to murder Mr. Marshall.

Following the guilty verdict and sentence of death against respondent, his case was automatically appealed to the Supreme Court of Illinois. That Court affirmed the conviction, finding no police interrogation which might constitute a *Miranda* violation and concluding that respondent's surrender of the murder gun was a free and voluntary act; error was found, though, in the qualifying of the jury for the death penalty and the case was remanded for re-sentencing. *People* v. *Doss*, 44 Ill. 2d 541, 256 N. E. 2d 573 (1970). Subsequently, the original trial judge sentenced respondent to a term of not less than 75 years nor more than 100 years in the Illinois State Penitentiary, which sentence respondent has been serving until the present time.

Respondent then filed a petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinos, arguing that the state trial record itself demonstrated a violation of his *Miranda* rights in the prosecution's use of the murder weapon against him. Alternatively, Doss urged that he was entitled to a full evidentiary hearing in the federal court on the alleged *Miranda* error. The district court, after receiving a written response from the State and examining the trial record, denied the habeas corpus petition and the requested evidentiary hearing on June 11, 1971. Concluding that Doss had been made aware of his rights and had not been coerced or tricked into disclosure of the gun by the confrontation with his co-defendant, the court said: "Common sense indicates that, like other defendants in similar circumstances, petitioner realized that in view of the evidence already in police possession he might as well cooperate." *U. S. ex rel. Doss* v. *Bensinger*, No. 71 C 748 (N. D. Ill. 6/11/71; Memo Opinion of Judge Abraham Marovitz, page 8). The district court did grant Doss a certificate of probable cause for appeal, and his counsel docketed the appeal soon thereafter.

In the Court of Appeals for the Seventh Circuit, Doss' lawyer argued that, while totally *spontaneous* statements of previously silent defendants made without counsel may be voluntary and acceptable under *Miranda*, statements or actions instigated by police activity in the absence of defense counsel or a specific waiver must be considered products of a *Miranda* violation; counsel maintained that police *may not do anything* to change a defendant's mind about his silence once he refuses to talk. The State, on the other hand, argued that *Miranda* was concerned with coercive police *interrogations* and not with unpressured evidentiary or co-defendant confrontations, such as the one in the present case, which involved no questioning

by police. On June 15, 1972, the Court of Appeals panel issued their opinion substantially adopting respondent Doss' theory and ordering the district court to grant a Writ of Habeas Corpus. (See Opinion of the Court of Appeals attached hereto as Appendix A.)

REASONS FOR GRANTING THE WRIT.

A.

There Is a Conflict Among the Circuit Courts of Appeals and Among High State Courts on the Important Questions of Whether Confrontation Constitutes Interrogation Under Miranda and Whether Police Violate Miranda by Suggesting, Through Confrontations, etc., That a Suspect Reconsider His Decision to Remain Silent.

In its opinion below, the Court of Appeals for the Seventh Circuit decided that trial testimony failed to justify the "persistent inquiries" of police as to whether respondent wished to waive his *Miranda* rights and talk to them. The police course of conduct was further characterized in the following words: ". . . police officers not only continually *confronted* Doss, imploring him to talk after he chose to remain silent, but a *confrontation* was arranged with his co-defendant Falconer in order to elicit incriminating testimony." (See Appendix A., page A5.) (Emphasis added.) The court based the present decision upon its earlier strict interpretation of the *Miranda* rule in an interrogation case, *United States* v. *Crisp*, 435 F. 2d 354, 357 (7th Cir. 1970), wherein the court said: "Not even the slightest circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing less. . . ." Consequently, the court below concluded "that such police-

initiated action as evidenced in this case does not yield evidence which properly can be admitted absent some other affirmative indication by a defendant that he desires to waive his Fifth Amendment rights." (Appendix A., p. A6.) The court, however, *did not* find that Doss had been subjected to police coercion or that his will had been overcome by intimidation; in short, the decision did not deny the voluntariness of Doss' surrender of the murder gun.

Petitioners submit that the above decision, in its factual setting, is unique and that it conflicts directly with particular holdings of the Courts of Appeals for the Second, Fifth and Eighth Circuits. When faced with repeated police attempts to obtain a *Miranda* waiver from a suspect who had been warned of his rights and had been well treated, the Second Circuit Court of Appeals ruled that *Miranda* was not meant to prohibit policemen from asking a defendant to reconsider his choice of silence: "So to hold would be tantamount to enacting a 'no questioning' rule once a suspect was in custody. Such a rule finds no support in the Fifth Amendment nor, fairly read, in *Miranda* itself, nor in common sense." *United States* v. *Collins*, ... F. 2d ....., 10 Crim. L. Rptr. 2483, 2485 (2nd Cir. 3-7-72). See also *United States* v. *Brady*, 421 F. 2d 681, 683 (2nd Cir. 1970). A somewhat similar although less explicit decision was made in *Jennings* v. *United States*, 391 F. 2d 512, 515 (5th Cir. 1968), *cert. denied*, 393 U. S. 868 (1968), where a defendant who had invoked his right to silence had then been successfully questioned by a second police agency. In the present case, there were fewer police attempts to obtain a waiver than there had been in *Collins*, and Doss' invocation of his right to silence was less explicit than those in the cases cited above. Yet the court below found that all police approaches to Doss following his original silence constituted *Miranda* violations.

There is also conflict between the court below and the

Eighth Circuit Court of Appeals on whether simply confronting a silent defendant with his co-defendant or with an evidentiary item constitutes interrogation in contravention of the *Miranda* rule.[1] In *Haire* v. *Sarver*, 437 F. 2d 1262 (8th Cir. 1971), *cert. denied*, 92 S. Ct. 235 (1971), a woman was arrested for murder and after being warned of her rights she cooperated fully, admitting everything. Her husband came to the station looking for her but made no statement. *Police* then took *both* suspects to the area where the victim's body was supposedly hidden and questioned the woman, trying to jog her memory. When she became confused, her husband suddenly responded to the questions and directed police to every piece of evidence of the murder. The Court of Appeals ruled that the husband's statements during the body hunt were admissible because they had been spontaneous and voluntary, not the products of coercion or police interrogation directed toward him. A similar decision in *Caton* v. *United States*, 407 F. 2d 367 (8th Cir. 1969), *cert. denied*, 395 U. S. 984, found admissible, statements made by co-defendants to each other while sitting in the back of an F. B. I. auto during transfer from one city to another. Nevertheless, the court below found the confrontation between co-defendants in the present case, which included no police interrogation during or after the confrontation, to be a *Miranda* violation.

In addition to the Supreme Court of Illinois, several state review courts have decided cases similar to the present one with results opposite of the decision below. See: *State* v. *Williams*, 182 N. W. 2d 396, 405 (Iowa Sup. Ct. 1970); *Land* v. *Commonwealth*, 176 S. E. 2d 586 (Va. S. Ct. of App. 9/4/70); *Combs* v. *Commonwealth*, 438 S. W. 2d 82 (Ky. 1969); *Howell* v. *State*, 247 A. 2d 291 (Md. App.

1. The Ninth Circuit's Barnes decision does not figure directly in the conflict because it involved interrogation after the confrontation. U. S. v. Barnes, 432 F. 2d 89, 91 (9th Cir. 1970).

1968), *cert. denied*, 396 U. S. 907; *State* v. *Burnett*, 429 S. W. 2d 239 (Mo. 1968); *State* v. *Welch*, 476 P. 2d 822 (Ore. App. 1970); *State* v. *Geldart*, 279 A. 2d 588 (N. H. Sup. Ct. 1971).

Petitioners respectfully submit that this Court should resolve the conflicts between the Court of Appeals for the Seventh Circuit and the courts mentioned above so that criminal justice can be more effectively administered.

B.

The Decision Below Rests Upon a Misinterpretation of This Court's Holding in Miranda v. Arizona, and Constitutes an Unwarranted Extension of the Miranda Rule.

In *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966), this Court addressed itself to the problem of confessions produced by police interrogation of defendants who were unaware of their rights and lacking the advice of counsel. The Court held that, when an individual in custody is subjected to police questioning, the Fifth Amendment privilege against self-incrimination is jeopardized and so procedural safeguards must be employed to protect the privilege. These safeguards included giving certain warnings and obtaining a waiver of the rights described in the warnings before interrogation began. During the course of its opinion, this Court said that: "the fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 86 S. Ct. at 1630. This Court made clear at all points in its *Miranda* opinion that it was referring to custodial interrogation; at no point did the Court speak in terms of custodial confrontation.

"By custodial interrogation, we mean *questioning* initiated by the law enforcement officers after a person has been taken into custody." 384 U. S. at 444. (Emphasis added.)

It is important to note that, in contrast to the facts of *Miranda* v. *Arizona* and its companion cases, the present fact situation includes *no interrogation* of respondent as to the crime itself but only questions related to identification and waiver (R. 235, 236). When respondent did agree to turn over the murder weapon to police, all their efforts to initiate conversation with him had already ceased; he was not undergoing a coercive interrogation (R. 786), but was merely participating in a low-pressure confrontation with his co-defendant in an office removed from the jail's cell area (R. 786). Throughout its entire description of this confrontation, the record is void of any of the trickery or police tactics described at length in *Miranda*. 384 U. S. at 446-56.[2] Nor is there evidence that respondent was in any way subjugated to the will of his jailers. 384 U. S. at 457.

In fact, Respondent's co-defendant, Falconer, was the one who initiated the confrontation in Capt. Iasparro's office (R. 156); it was he who wanted to get the murder weapon from petitioner and who first spoke to him in the office (R. 128-30, 136-140, 146-48, 158-160, 170). The police did not bring petitioner into the office to question him, and there is no indication that they made an agreement with Falconer to do what they couldn't. According to all the witnesses at the suppression hearing, no physical or mental techniques of coercion were applied to petitioner in Capt. Iasparro's office. Falconer merely indicated that he had confessed and suggested that petitioner lead police to the gun—a request with which petitioner quickly and willingly complied.

2. Compare Frazier v. Cupp, 394 U. S. 737 (1969) where the questioning officer falsely told the petitioner that his codefendant had confessed. This ploy, along with the officer's seemingly sympathetic attitude, eventually caused Frazier to spill out his story.

The facts of the confrontation as they came out in the trial court indicate nothing more than a sincere unilateral change of heart by petitioner predicated upon new information about the police case against him. As Judge Marovitz said in his opinion below: "Common sense indicates that like other defendants in similar circumstances, petitioner realized that in view of the evidence already in police possession he might as well cooperate." (Memo. Opinion, p. 8.)

A confrontation atmosphere, similar to the one in the present case differs from an interrogation atmosphere because in the former a defendant retains the mental faculties to make a voluntary decision. The present case is thus distinguishable from *United States* v. *Barnes*, 432 F. 2d 89 (9th Cir. 1970). In *Barnes*, the defendant was confronted with similar entreaties from his companion, but then following the companion's pleas, the federal agent present asked, " 'What about it, is it true or not?' " 432 F. 2d at 91. Concerning this dialogue the court stated: "Thus confronted with their companion's statement *and questioned as to its truth or falsity*, Fox and Barnes admitted their participation in the smuggling venture" (Emphasis added). *Id.* at 91. In the present case there was no such follow-up police questioning. In *Barnes*, unlike in the present case, the court was following the definitional guidelines of *Miranda* which state that "interrogation" means questioning. It is true that the Supreme Court in *Miranda* held that:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, that he wishes to remain silent, *the interrogation must cease.*" 384 U. S. at 473 (Emphasis added).

However, petitioners submit that the meaning of interrogation must be decided within the context of *Miranda*. Throughout *Miranda*, it is eminently clear that interrogation

is related to compulsion and coercive tactics of questioning, tactics which have the effect of robbing the defendant of his mental agility.

It is readily admitted that the now common-place *Miranda* warnings were tailored to prevent police from capitalizing on a defendant's ignorance; the requirements of a lawyer's presence, if requested, and cessation of questioning, if requested, were designed to guard against police conquest of a weak will. But did this Court intend, as the court below believes, to make an accused's silence, once adopted, an irrevocable decision which must be encouraged by isolating him from information that might cause him to change his mind about waiving his rights? Petitioners submit that there was no such intention on the part of the Court, that so rigid a concept of the privilege would run contrary to the prevailing idea of thoroughly informing the defense—through voluminous warnings, extensive discovery, etc.—of relevant information needed for making intelligent decisions. Knowledge of what a co-defendant has told police, if revealed honestly and simply as in the present case, would seem to be quite helpful to a defendant in deciding intelligently whether to waive his rights and cooperate. Court opinions cited in Point A evidently sympathize with this view. They realize that isolation of a defendant from information available to police could itself mislead him. Also, forcing police to encourage a suspect's silence rather than to merely respect it would needlessly obstruct essential police investigative work. As another panel of the Court of Appeals for the Seventh Circuit so eloquently pointed out in *United States* v. *Ganter*, 436 F. 2d 364, 370 (7th Cir. 1970): "We do not conceive that the Supreme Court decisions which have been hammered out in cases such as *Miranda*, in the interest of shaping and preserving basic constitutional rights and privileges, should be construed as being intended to pamper or indulge those

whose conduct has run afoul of the legitimate public interest of an ordered society as expressed in our criminal statutes."

By granting the present petition and overruling the extreme interpretation of *Miranda* below, this Court could clarify once and for all the original purpose of its *Miranda* decision.

C.

Even if Police Had Violated Respondent's Miranda Rights in Obtaining the Murder Gun from Him, Still He Was Convicted Beyond a Reasonable Doubt and His Application Was Correctly Denied.

The record shows that two eye witnesses to the murder and armed robbery positively identified the respondent, Doss, and his co-defendant. Mrs. Marshall, the victim's widow, and Mrs. Donath, a store clerk, both had ample opportunity to observe the co-defendants during the course of the crime, and both witnesses were positive in their identifications (R. 617-618; 640-641).

Linda Dupree Johnson, *who knew both of the trial defendants prior to the murder*, testified at trial that she rode to the victim's store with both defendants about an hour before the crime, while the defendants cased the premises. At this time one of the defendants told her that they were going to rob the victim. The defendants then took Linda to her sister's house in South Beloit and both defendants left on foot at about 11:50 p.m. They returned about twenty-five minutes late in John Patton's car and asked Linda and her sister if they would go to Rockford with them (R. 590-595). The offense occurred during the time the defendants were absent from the sister's house (R. 650).

John Patton, another acquaintance of both defendants, testified to accompanying the defendants to a South Beloit sporting goods store on the afternoon of April 3, 1967, the day of the killing, at which time Doss purchased ammuni-

tion (R. 656-657). Later that evening the defendants told Patton of their plan to rob the victim and asked him to drive the get-away car (R. 658-659).

Between 12:00 and 12:30 a.m. both defendants came to Patton's house, a distance of about two blocks from the victim's store, and asked him to take them to see Linda Dupree. Patton and his wife Mary, then drove the defendants to Rockford, after stopping to see Linda Dupree. During this trip, according to the testimony of both Pattons, the defendants admitted robbing and shooting the victim (R. 654-665). Mrs. Patton testified to having heard Doss say he had hit one of the ladies. (The victim's widow was knocked unconscious at the conclusion of the robbery). Mrs. Patton heard Falconer say that he hoped the man died (R. 718-719).

A Rockford liquor store proprietor identified both defendants as having entered his store at about 12:55 a.m., April 4, 1967, at which time he noticed a pistol protruding from a pocket of one of the defendants (R. 709-711).

The manager of the Rockford Motel positively identified both defendants as having registered at the motel between 1:00 p.m. and 2 p.m., April 4, using ficticious names (R. 749-752).

When officers arrested defendants in this motel later the same morning, they found in their room a .38 caliber revolver (R. 796). This pistol was positively identified by the widow as belonging to the victim (R. 622). It was further identified, by serial number, by the sporting goods salesman who had sold it to the victim (R. 735-736). Officers also found loot from the armed robbery in the defendant's motel room (R. 817).

Additional witnesses provided details of the defendants actions before and after the murder which pointed to his guilt. Falconer confessed to the crime and implicated Doss

in two statements, one of which was not suppressed and could have been used against Doss if the two men had been tried separately (R. 86). Clearly, the evidence of respondent Doss' guilt was overwhelming, and introduction of the .32 caliber pistol used in the offense had merely a cumulative effect in the State's case.

Therefore, if this Court should decide that admission of the murder gun into evidence was error under the *Miranda* ruling, then petitioners submit that the decision of the court below was still unwarranted, since the trial error must have been harmless beyond a reasonable doubt. On prior occasions this Court has held violations of the Sixth Amendment confrontation privilege through use of joint-defendants' statements at trial to be harmless error. *Schneble* v. *Florida*, ... U. S. ....., 92 S. Ct. 1056, 1060 (1972); *Harrington* v. *California*, 395 U. S. 250, 254 (1969). Other federal courts have held various Fifth Amendment *Miranda* errors to be harmless in the face of overwhelming evidence. In *United States* v. *Pridgen*, 435 F. 2d 152, 153 (5th Cir. 1970), the court held that admission of an answer obtained without prior warnings was harmless error. See also: *United States ex rel. Dudley* v. *Brantley*, ... F. 2d ....., Slip Op. No. 71-1813 (7th Cir., 5-12-72); *United States* v. *Tucker*, 415 F. 2d 867 (2nd Cir. 1969); *People* v. *Landgham*, 257 N. E. 2d 484 (Ill. App. 1970); *People* v. *Smith*, 230 N. E. 2d 188 (Ill. Sup. Ct. 1968).

CONCLUSION.

For the foregoing reasons, petitioners submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 71-1582.

September Term 1971—April Session 1972

UNITED STATES OF AMERICA ex rel. RONALD DOSS,
Petitioner-Appellant,
vs.
PETER BENSINGER AND JOHN TWOMEY,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-748

ABRAHAM L. MAROVITZ, *Judge.*

Argued April 12, 1972—Decided June 15, 1972

Before DUFFY, *Senior Circuit Judge,* CUMMINGS and HAMLEY*, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* One Lindford Marshall was shot by a gunman during an armed robbery of his grocery store in South Beloit, Illinois, on April 3, 1967.

Petitioner and a co-defendant, Ophem Falconer, were arrested for the crime the following morning after a raid

* Circuit Judge Frederick G. Hamley of the Ninth Circuit is sitting by designation.

on their motel room in Rockford, Illinois, by sheriff's police.

The murder weapon (a pistol), several hundred dollars in cash and a revolver owned by Marshall were found in or around the Rockford motel room which had been occupied by defendants.

There was and is no claim that petitioner herein used a gun or any kind of weapon during the robbery.

The chain of events leading to the custodial confrontation which produced the murder gun, began with the arrest of petitioner and his co-defendant by the sheriff's police on April 4, 1967, in the early morning hours. After having been advised of his constitutional rights by the officers who had taken petitioner into custody, he was asked by the officers to waive these rights. However, petitioner remained mute, refusing to divulge his name or age. Petitioner then was booked and incarcerated.[1]

About one hour later, another pair of police officers advised petitioner of his rights. Petitioner again indicated that he would make no statement.

After Doss had been placed in a cell at the Winnebago County jail, co-defendant Falconer confessed and apparently suggested that petitioner Doss had hidden the gun.

Petitioner was then taken to one Captain Iasparro's office where various police officers were present with Falconer. Falconer told petitioner that he had confessed and asked petitioner to show the police officers where the gun was hidden. A short time thereafter, petitioner

1. One police officer asked petitioner Doss several times to identify himself and whether he wished to waive his *Miranda* rights, stating at trial with respect thereto "If I asked him once, I probably asked him a dozen times." (State record of trial, pages 235-236).

did indicate the location of the buried gun and currency.[2] He then led the police to the location where the gun was buried near the motel where he and Falconer had been apprehended, and subsequently the gun was entered into evidence.

Falconer did not testify at the motion to suppress as to what, if anything, he and the police had agreed upon before Falconer confronted Doss.

In the State Court, a single attorney was appointed to represent both Doss and Falconer. The trial court denied a motion for severance. Petitioner filed a pretrial motion to suppress the murder weapon, claiming it was discovered through a violation of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The trial court denied this motion. The weapon was admitted into evidence along with proof of petitioner's conduct leading the officers to the weapon and statements made by petitioner during this time.

A jury found both defendants guilty. The Illinois Supreme Court affirmed the conviction but did enter an order that each defendant be re-sentenced because of an error in the manner in which the jury had been qualified for the death sentence. *People* v. *Doss*, 44 Ill. 2d 541, 256 N. E. 573 2d (1970). The original trial judge imposed sentence on each defendant of not less than 75 years nor more than 100 years in the Illinois State Penitentiary, which sentence petitioner is now serving.

Petitioner Doss proceeded in *forma pauperis* and petitioned for a writ of habeas corpus pursuant to 28 U. S. C. § 2254(d) which petition was denied by the District Court. In the petition, Doss alleged that the state trial record demonstrated a *Miranda* violation, and relief should be

2. Detective Renfro testified to the effect that Doss was brought "to the office because Falconer wanted to talk to him to get the gun." (State record of trial, page 156).

granted for this reason. In the alternative, he argued that he was entitled to an evidentiary hearing in federal court with respect to deficiencies in state court proceedings. The District Court denied the habeas corpus petition and declared that no evidentiary hearing was necessary, but granted a certificate of probable cause for appeal.

It is apparent from the fact situation of the case at bar that Doss desired to remain silent notwithstanding continual attempts by the police to interrogate him. Close scrutiny of the testimony at trial with respect to the police officers' pertinent inquiries fails to demonstrate a justification for such questioning absent the presence of counsel for the defense. As the Supreme Court indicated in *Miranda* v. *Arizona, supra,* where custodial interrogation proceeds without the presence of defense counsel, the Government bears a "heavy burden" of demonstrating that the suspect's constitutional rights have been respected.

In *Miranda, supra,* the Supreme Court has clarified the permissible scope of custodial interrogation even after a waiver of constitutional rights by the suspect, an element which was not present herein. The Court stated with respect thereto at pages 473-474:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

Pertinent is the discussion of *Miranda's* application in our decision in *United States* v. *Crisp,* 435 F. 2d 354 (7 Cir., 1970), at page 357:

> "Both the letter and spirit of the Supreme Court's decision in *Miranda* call for condemnation of even

this seemingly innocuous police conduct. The procedural safeguards imposed in that case were premised upon the observation that custodial interrogation in the absence of defense counsel is inherently intimidating and destructive of free enjoyment of the constitutional privilege against self-incrimination. To be effective, those safeguards must be fully observed, and the rights of the suspect must be jealously guarded. Not even the slightest circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing less. . . ."

Furthermore, the police officers not only continually confronted Doss, imploring him to talk after he chose to remain silent, but a confrontation was arranged with his co-defendant Falconer in order to elicit incriminating testimony. Such confrontations with co-defendants has been condemned in other courts as a violation of *Miranda* protections, and the evidence elicited thereform has been held inadmissible absent some other affirmative indication of waiver.

In point is the decision in *United States of America* v. *Barnes*, 432 F. 2d 89 (9 Cir., 1970) at page 91:

". . . The rule was established in *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) that if the defendant '. . . indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no question. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.' ID. at 444-445, 86 S. Ct. at 1612.

"The evidence in this case is uncontroverted that both Knox and Barnes had specifically indicated that they did not wish to be interrogated further. Each refused to sign a waiver of his constitutional rights and that refusal was noted by the authorities. Thus,

> the subsequent confrontation with Miss Trosello and the interrogation that followed, for the obvious purpose of getting defendants to abandon their self-imposed silence, were in flagrant violation of the rule as set forth in Miranda. . . ." [See *State* v. *Mills*, 6 N. C. App. 347, 170 S. E. 2d 189 (1969).]

We are of the opinion that such police-initiated action as evidenced in this case does not yield evidence which properly can be admitted absent some other affirmative indication by a defendant that he desires to waive his Fifth Amendment rights.

For the first time, the respondents argue on this appeal that if the trial court erred under the *Miranda* ruling in denying petitioner's motion to suppress, such error was harmless. As noted, the State was erroneously permitted to prove that the petitioner led the police to the buried weapon, to introduce the weapon into evidence, and to demonstrate that this was the murder weapon. The untainted evidence against petitioner was not so overwhelming as to foreclose "a reasonable possibility that the improperly admitted evidence contributed to the conviction." *Schneble* v. *State of Florida*, ... U. S. ....., 40 U. S. L. W. 4299, 4301 (March 21, 1972); *Chapman* v. *California*, 386 U. S. 12, 24; see *Harrington* v. *California*, 395 U. S. 250, 254. "[B]ased on our own reading of the record and on what seems to us to have been the probable impact of . . . [the tainted evidence] on the minds of an average jury," *Harrington* v. *California*, *supra*, we cannot declare our belief that the improperly admitted evidence was harmless beyond a reasonable doubt. Cf. *United States ex rel. Dudley* v. *Brantley*, ... F. 2d ....., Slip Op. No. 71-1813 (7 Cir., May 12, 1972).

The judgment of the District Court herein must be and is reversed with instructions to grant the writ of habeas corpus.

REVERSED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604.

July 21, 1972.

Before

Hon. F. RYAN DUFFY, SR., *Circuit Judge*
Hon. FREDERICK G. HAMLEY, *Circuit Judge,*
Hon. WALTER J. CUMMINGS, *Circuit Judge.*

UNITED STATES OF AMERICA, ex rel. RONALD DOSS, *Petitioner-Appellant,* vs. PETER BENSINGER, et al., *Respondents-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (71 C 748)
No. 71-1582	

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.